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REVIEWS.

Foundations of Legal Liability. By Thomas Atkins Street. Three Volumes, pages xxx, 500; xviii, 559; xi, 572. Edward Thompson Co., 1906.

In these days, out of the great mass of legal publications comparatively few emerge as real achievements in legal scholarship. The subject of this review is one of the few. Very evidently it is by an academic man and it appeals primarily to academic students of the law; but it appeals equally as much to the practitioner who desires to understand fundamental principles and to know other things than the mere tricks of the trade.

The three volumes deal respectively with Torts, Contracts and Common Law Actions. They purport to contain "a presentation of the theory and development of the common law." Throughout the author shows a knowledge of the best previous thought on the subject, a readiness to adopt and make use of it, and strength enough to depart from it on occasion and come to a different conclusion. It is impossible in a brief review to consider the accuracy of many of these conclusions, nor is it possible to criticise them intelligently without a careful study of the sources from which they are drawn.

The treatment of the subject of liability for torts in the first volume is not revolutionary, but is original and highly enlightening. The classification of torts is in some respects new and is of assistance in gaining an understanding of the reasons for liability. For instance, the author puts trespasses committed not by the defendant directly, but through agents, animate and inanimate, into one class, under the title "secondary trespass formation." This classification, besides grouping several allied subjects not heretofore logically classified, assists the author in working out his treatment of the subject of negligence. The exposition of the principles underlying liability for torts in the various subdivisions of the subject is uniformly good, particularly so in the cases of secondary trespass, defamation, malice and negligence. Perhaps the author is not wholly justified in his criticism of the doctrine that negligence consists in a breach of duty to take care. And perhaps he has not improved upon it as much as he thinks. Is it much of an improvement over "negligence is a breach of duty" to say "negligence is a sort of legal delinquency?" However, he is right in saying that the doctrine that the law imposes a duty to take care is no real explanation of the foundation of liability for negligence.

The subject of Contracts in volume two is not given as complete an exposition as is the subject of Torts; but the results obtained therein by the author are in part more startling and original. Volume two contains four parts and an appendix. The author treats first the history and general principles of con-

tract; second, the history and theory of the law of bailment; third, the history and principles of the law of bills and notes; and fourth, the law of representation or agency as affecting the relations of principal and agent and master and servant. The appendix contains the negotiable instrument's law with annotations. We may dismiss the second, third and fourth parts with the remark that they are adequate and accurate, but not new and unusual. The treatment of agency is much like that of Professor Huffcut. The historical treatment of bills and notes is deserving of especial commendation.

The first part alone of the second volume ought to be sufficient to establish the author's reputation as a brilliant thinker in contracts. After two chapters on the early history of contract, he plunges into an investigation of the doctrine of consideration, its foundation and its character, necessarily involving a discussion of the actions of debt and assumpsit. It is here that he departs most widely from prior accepted conclusions. Consideration in the sense of a detriment to the promise is required only in the case of unilateral contracts. Bilateral contracts acquire their binding character from *consent* alone, and not at all from consideration in the sense of detriment. He abandons the vain effort of determining how it is that a promise is binding because it is a detriment and is a detriment because it is binding. A third form in which consideration for a promise may appear is a pre-existing legal obligation or debt, the doctrine of consideration as a detriment to the promise being here again abandoned. No doubt these conclusions will find strong opposition on the part of those who have been at so much pains to establish the accepted theories of consideration.

The author's mastery of the distinctions between unilateral and bilateral contracts is very gratifying to the reader. His treatment of the foundation of liability on a bilateral contract is beyond question a brilliant achievement in constructive reasoning. He lays down the principle that the obligation of a bilateral contract is based upon consent alone, but he limits the number of enforceable bilateral contracts to those consisting of mutual promises to do acts which, considered wholly apart from the circumstances of the individual case, would be a detriment to the actor. This limitation necessarily destroys the simplicity of the author's construction, but is of course required by the long-established course of judicial decision. By means of this principle the author explains the seeming paradox that a promise to perform an act may be valid consideration for a promise when the actual performance itself would not be. He asserts that a unilateral promise is, for historical reasons, not enforceable unless the act or forbearance given in return amounts to a detriment, but that bilateral promises are binding purely on consensual grounds. However, even though we should agree with him that the basis of liability on bilateral contracts is consent and not consideration, still it seems doubtful whether we should not still further limit the number of enforceable bilateral contracts to those

consisting of mutual promises to act or to forbear, which act or forbearance *will amount to a detriment in the individual case*. This would bring the rule very close to that constructed by Professor Williston, though it would avoid the necessity of showing that the making of a promise is in itself a detriment. It would further be in harmony with those very numerous American decisions to the effect that bilateral promises are invalid where one of them is to do that which the promisor is already bound by contract to do. The author does not give an adequate review of these cases. Instead, he places conclusive weight upon such decisions as *Scotson v. Pegg*, 6 H. & N. 295, and *Abbott v. Doane*, 163 Mass. 433.

The author invents (Volume II, page 74) the term "incompetent consideration" for the doing of an act which the actor is under a legal obligation to do. His treatment of this is not altogether convincing. He adopts Sir F. Pollock's reasoning that the doing of such an act is no consideration because it is no detriment to the doer. Later, however (Volume II, page 99), in supporting the doctrine that part payment of a debt is not sufficient consideration for a promise to forego the residue, he cites Professor Ames to the effect that the doing of any act is such a detriment to the actor as will support a promise, and adds: "We admit that payment of part of a debt is an act and that such act furnishes a consideration for the promise to forego the residue. The point, however, is that the consideration is incompetent." This appears to say, part payment is incompetent consideration because it is no detriment, and it is no detriment because it is incompetent. The question turns on whether part payment is actually a detriment, and there is much to be said in favor of the position of Professor Ames.

The author's conception of legal duty as an adequate substitute for consideration in the sense of detriment causes him to classify many obligations as truly contractual even though they are not assumptual. It enables him to throw a clear light upon the situation existing with reference to promises for the benefit of a third person, the chapters on that subject being a distinct addition to its literature. It further requires him to re-classify the subject of quasi-contracts. Among the quasi-contracts he places "promises implied as of fact." It appears to the reviewer that the author's treatment of this term is not altogether clear. Actual, definite promises may be made by conduct as well as by words, in which case the obligation assumed is certainly not quasi-contractual. Yet such promises would seem to be "promises implied as of fact." Of course, the author is right in classifying as quasi-contractual those obligations created by law because justice demands it, even though an actual definite promise cannot be found in the conduct of the parties. But in these cases there is no "promise implied as of fact." Notwithstanding this possible obscurity, the author's basic idea is correct, and his conception of legal duty as contractual is second in importance only to his theory of bilateral contracts.

Of his work on the doctrines of accord and satisfaction the author, in his preface, says: "We have, it is thought, succeeded in giving a rational and consistent account of this subject from beginning to end." It is beyond doubt that in the main his work bears out his statement; but it appears to the reviewer that the author has failed to give due consideration to the distinction between an executory accord, looked upon as a contract in itself and as the basis of an action at law, and an executory accord looked upon as a satisfaction of the prior obligation and a bar to an action thereon by the creditor. It may well be that an action lies for failure to perform an executory accord, even though there remains a right of action on the original obligation. However, the author's account of the historical basis for the rule that an executory accord is no satisfaction is beyond criticism; and his description of the doctrine as one of "the two greatest mysteries of the common law," and as "a fossil that has come down to us from a previous legal formation" is very apt and interesting. In chapter xiii of volume two, the author sets forth in convincing fashion the doctrines of novation, establishing that "in its essence the novation is an executory accord, and the principle underlying it is at war with the hoary rule that the executory accord is invalid."

Volume three treats of the forms of action at common law. It is undoubtedly true that knowledge of these actions and of their history is necessary to an understanding of the substantive common law, and that in getting rid of these forms jurisprudence lost as well as gained. The author's discussion of the origin and scope of the various remedies at common law is entirely proper and satisfactory.

The entire work is written in a clear and entertaining style. The volumes are in dignified form, with good paper, good margins and legible, errorless type. The substance of each paragraph is indicated in notes printed on the margin. Volume three contains a table of some four thousand cited cases and a very full index. In his preface the author frankly exhibits a calm confidence that his work is original and well done. This confidence is justified.

A. L. C.

Elementos de Derecho Internacional Privado. Third edition. By Manuel Torres Campos. Madrid, 1906. Pages 549.

With what was contained in the first edition of this work, issued in 1893, has been incorporated much of what was in the subsequent treatise from the same pen, on the Foundations of Extraterritorial Legislation (*Bases de una Legislacion de Extraterritorialidad*, Madrid, 1896). The present edition omits much of the bibliography of the earlier ones and adds many references to the publications of the last ten years, including the doings of the four Hague Conferences for the Promotion of International Private Law, of which the author was a distinguished member.

His discussion of the choice to be made between personal and territorial law as the criterion of individual rights and duties is